KIRANJIT KAUR KALWANT SINGH A

v.

CHANDOK NARINDERPAL SINGH

HIGH COURT MALAYA, KUALA LUMPUR B
SURAYA OTHMAN J
[ORIGINATING SUMMONS NO: S8-24-147-2008]
10 DECEMBER 2009

FAMILY LAW: *Divorce - Petition - Presentation to court before expiration of period of two years from date of marriage - Exceptional circumstances or hardship - Whether reference to a conciliatory body impracticable - Law Reform (Marriage and Divorce) Act 1976, ss. 50(2), 106(1)(vi)* C

This was an application by the plaintiff wife under s. 50(2) of the Law Reform (Marriage and Divorce) Act 1976 ('Act') seeking permission to present a petition for divorce to the court before the expiration of the period of two years from the date of her marriage to the defendant husband. The plaintiff further applied to be exempted from referring her matrimonial difficulty to a conciliatory body pursuant to s. 106 of the Act. The two main issues requiring consideration were: (i) whether there were exceptional circumstances or hardship allowing the plaintiff to present the petition to the court before the expiration of the two-year period from the date of the marriage; and (ii) whether there were exceptional circumstances which made reference to a conciliatory body impracticable, thus exempting the plaintiff from referring her matrimonial difficulty to said body. The plaintiff contended that the defendant's conduct (threatening the plaintiff and slandering her in blog postings on the internet) had caused her humiliation and embarrassment, which in turn had affected her health and well-being. It was submitted by the plaintiff that the defendant's misconduct should be considered cruelty which caused hardship to the plaintiff and, therefore, fell under "exceptional circumstances" as required under s. 50(2) and the proviso under s. 106(1)(vi) of the Act. D E F G H

Held (allowing the application):

(1) In the present case, the defendant's conduct had caused deep humiliation and untold embarrassment to the plaintiff since the blog postings by the defendant on the internet operated in a borderless realm and would continue to exist until the maker of I

A the blog removes it. The defendant's slanderous statements equating the plaintiff to a prostitute and a swindler had damaged the plaintiff's reputation as a woman and a human being, and would continue to haunt and harass the plaintiff even after being removed from the internet. The hardship
B caused was not only past but present and continuing. In the circumstances, a further step ought to be taken in interpreting the said provisions in accordance with the modern development of information and technology. Therefore, the interpretation of "exceptional circumstances" should not be restricted or limited
C to just physical and mental abuse or cruelty, but must also include any circumstances or hardship caused by any slanderous statements made on the internet. After consideration of the relevant case law and the facts of this case, it was clear that the hardship suffered by the plaintiff was out of the ordinary and
D fell within the definition of exceptional circumstances as envisaged by both ss. 50(2) and 106(1)(vi) of the Act. Furthermore, since the parties had been separated since July 2007 and the defendant resident in France, it was impracticable for them, especially the husband, to be referred to a conciliatory
E body. Moreover, the chances of reconciliation between the parties were improbable, if not nil. Thus, the two issues should be answered in the affirmative. (paras 27, 28, 29 & 30)

Case(s) referred to:

F *Bowman v. Bowman [1949] 2 All ER 127* ***(refd)***
Brewer v. Brewer [1964] 1 All ER 539 ***(refd)***
Fay v. Fay [1982] 2 All ER 922 ***(refd)***
Hillier v. Hillier and Latham [1958] 2 All ER 261 ***(refd)***
Gollins v. Gollins [1963] 2 All ER 966 ***(refd)***
Ng v. Lim [1968] 1 LNS 89 ***(refd)***
G *Re PMK [1981] NI 211* ***(refd)***
Tan Keok Yin v. Cheah Saw Hong [1991] 1 CLJ 815; [1991] 4 CLJ (Rep) 100 HC ***(refd)***
V v. V [1966] 3 All ER 497 ***(refd)***
W v. W [1966] 2 All ER 889 ***(refd)***

H **Legislation referred to:**
Divorce and Matrimonial Proceedings Rules 1980, r. 4(1)
Law Reform (Marriage and Divorce) Act 1976, ss. 50(2), 106(1)(vi)

Matrimonial Causes (Northern Ireland) Order 1978, art. 5(1)

I *For the plaintiff - Francis Pereira; M/s Francis Pereira & Shan*

Reported by Suresh Nathan

JUDGMENT

Suraya Othman J:

Introduction

[1] The plaintiff in her originating summons (encl. 1) applied to this court under s. 50(2) of the Law Reform (Marriage and Divorce) Act 1976 ("LRA 1976") to allow the presentation of the petition for divorce to the court before the expiration of the period of two (2) years from the date of the marriage. The plaintiff further applied for exemption to refer her matrimonial difficulty to a Conciliatory Body which is governed by s. 106 of the same LRA 1976.

[2] The details of the plaintiff's application prayed for are as follows:

(1) The plaintiff is allowed to present a petition for divorce to the court before the expiration of the period of two (2) years from the date of the marriage between plaintiff and defendant;

(2) The plaintiff is exempted to refer the matrimonial difficulty to a Conciliatory Body;

(3) The plaintiff is allowed to file a divorce petition within 30 days from the date of this order;

(4) The plaintiff to pay cost of this application; and

(5) Other further reliefs the court thinks fit.

Facts And Background

[3] The plaintiff in this case has been married to the defendant under the Sikh religion and ritual on 18 November 2006, the plaintiff and defendant registered their marriage on 12 Mac 2007. They had lived and cohabited in Jalan Pantai Dalam, Kuala Lumpur after the said registration. On 11 July 2007 the defendant went to France. The marriage did not turn out to be a happy one as the plaintiff found the defendant to be deceitful and unreasonable. The defendant's conduct which the plaintiff complained of, *inter alia* in her affidavit is summarized in the following paragraphs:

A (i) On 26 November 2007 the defendant had threatened the plaintiff *vide* a telephone conversation that he would destroy her and her family;

(ii) On 25 and 27 August 2008 the defendant had sent an e-mail
B to the plaintiff equating her to a prostitute and a swindler;

(iii) On 15 September 2008 the defendant had sent an e-mail to the plaintiff's relatives threatening harm to the plaintiff and her family;

C (iv) On 23 August 2008 the defendant had posted a blog on the internet smearing the plaintiff's honour and reputation which was subsequently forwarded to the plaintiff's family members and friends;

D (v) In an undated blog bearing the address http:www.wix.com/Navin/06/KIRANKANG the defendant posted malicious stories about the plaintiff and forwarded the same to various people who know the plaintiff;

E (vi) On 1 October 2008 the defendant had maligned the plaintiff *vide* a blog posting entitled "Your home town celebrity";

(vii) On 30 December 2008 the defendant posted new stories insulting the plaintiff under the title "Thank You";

F (viii) The defendant continues to update on a weekly basis some of the blog posting the most recent of which was on 11 January 2009.

Judgement Of The Court

G **[4]** The law applicable in this application is found in r. 4(1) of the Divorce and Matrimonials Proceeding Rules 1980 which states:

> An application under Section 50 of the Act for leave to present a petition for divorce before the expiration of two (2) years from the
H date of the marriage shall be made by originating application.

[5] The law on the exemption of the presentation of the petition for divorce to the court before the expiration of the period of two (2) years from the date of the marriage is found in s. 50(2) of the LRA 1976 which state as follows:

I

A judge of the court may, on an application made to him, allow the presentation of a petition for divorce within the specified period on the ground **that the case is one of exceptional circumstances or hardship suffered by the petitioner;** but in determining the application the judge shall have regard to the interests of any child of the marriage and to the question whether there is reasonable probability of the reconciliation between the parties during the specified period.

[6] Whereas the law on the exemption to refer matrimonial difficulty to Conciliatory Body is governed by s. 106(1) of the LRA 1976 which state as follows:

106(1) No person shall petition for divorce, except under sections 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:

Provided that this requirement shall not apply in any case:

(i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;

(ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;

(iii) where the respondent has been required to appear before a conciliatory body and has willfully failed to attend;

(iv) where the respondent is imprisoned for a term of five years or more;

(v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or

(vi) **where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.**

[7] From the affidavits filed by the plaintiff, the two main issues to be considered by this court are:

1. Whether there are exceptional circumstances or hardship for allowing Plaintiff to present the petition for divorce to the Court before the expiration of the period of two (2) years from the date of the marriage; and

A

2. Whether there are exceptional circumstances which make reference to a conciliatory body impracticable thus exempting the Plaintiff from referring her matrimonial difficulty to Conciliatory Body.

B **[8]** Counsel for plaintiff submitted that the plaintiff is a victim of the defendant's lunatic behaviour. The defendant's conduct had caused damage to the plaintiff's honour and reputation as a woman, as a sister to her siblings and daughter to her parents. As an executive in Maybank and known to many people, the actions by the defendant had caused humiliation and embarrassment to the C plaintiff and this in turn has affected her health and well being.

[9] Counsel for plaintiff also submitted that the actions by the defendant which are continuing to date had caused extreme hardship to the plaintiff, furthermore what the plaintiff had undergone are D definitely action which this court must consider to be exceptional circumstances.

[10] Plaintiff's counsel submitted the case of *Ng v. Lim* [1968] 1 LNS 89 where the Federal Court of Singapore stated:

E

> In our opinion, the most significant part of the judgment may be found in the passage following the paragraph in which the reference is made to the case of *Gollins v. Gollins* [1963] 2 All ER 966. This passage reads as follows: "the present case, in my view, falls squarely within the principle enunciated in *Gollins*' case *(supra)* and F the respondent has, in my judgment, been guilty of the matrimonial offence of cruelty.

[11] Plaintiff's counsel also submitted another case, *Tan Keok Yin v. Cheah Saw Hong* [1991] 1 CLJ 815; [1991] 4 CLJ (Rep) 100. In this case the respondent not only refused to acknowledge and accept G that the marriage had broken down but began a trial of harassment and harmful activities to discredit and undermine the petitioner's position in his workplace such as calling the petitioner's superior and making a number of wild allegations on his character and person with the intention of discrediting him and jeopardizing his H position and status and disturbing close friends and relatives of the petitioners by disclosing distorted accounts of the petitioner's private life and activities so that he would be placed in a bad light. Here Lim Beng Choon J stated:

I

> Following the test laid down in *Katz v. Katz* case I would certainly agree that if the allegation of misconduct made by the husband petitioner against the wife respondent were true he would be entitled to an order of dissolution of the marriage.

[12] Counsel of plaintiff further submitted the case of *Gollins v. Gollins* [1963] 2 All ER 966 where Lord Reid stated:

> Sometimes a distinction is drawn between conduct which is not cruel in itself. That distinction has some validity. Where for example there is physical violence of a grave and weighty kind there is no need to look further, as I shall try to show in dealing with *Williams v. Williams*; but more often the conduct must take its color from the state of mind which lay behind it. Sometimes it is said that the matter can be left at large: that, although you cannot define cruelty, you can recognize it when you see it: and that, therefore, the trial judge should not be hampered by legal niceties and refinements.

[13] Using the above three cases, counsel for the plaintiff submitted that the misconduct of the defendant should be considered as cruelty which caused hardship to the plaintiff and therefore falls under the exceptional circumstances that is required under s. 50(2) and the proviso under s. 106(1)(vi) of the LRA 1976.

Finding Of The Court

[14] It is important to observe that the purpose of this general rule under s. 50(2) of the LRA 1976 is to curb impetuous and hasty resort by spouses to divorce. This court further noted that the purpose for the introduction of s. 106 of the Act is to encourage reconciliation. These purposes are clearly established in the Report of the Royal Commission on Non-Muslim Marriage and Divorce dated 15 November 1971. This Royal Commission was set up before the amendment of the Act to look into various issues relating to the marriage and divorce laws for non-Muslims.

[15] It is clear that pursuant to ss. 50(2) and 106(1)(vi) of the Act, the exception to this general rule is that there must be exceptional circumstances or hardship suffered by the plaintiff. As can be seen there are no clear cases submitted by plaintiff's counsel that exactly explained or defined the meaning of exceptional circumstances or hardship as required by ss. 50(2) and 106(1)(vi) of the Act. This court has to research for other cases to assist it in making a decision as to what constitutes exceptional circumstances or hardship.

[16] In the case of *Fay v. Fay* [1982] 2 All ER 922, The House of Lords explained:

> Parliament deliberately intended that the decision on what is or is not exceptional hardship or depravity in a particular case should be a matter for the judge at first instance to decide by making his own subjective value judgment as to whether the hardship or depravity was out of ordinary, when judged by prevailing standards of acceptable behavior between spouses and after taking account of all relevant circumstances.

[17] The House of Lords further stated that:

> 'Exceptional hardship' is not limited to past hardship but includes present and future hardship and therefore the court may properly take into account the hardship suffered by a young wife in having to wait for the elapse of three years from the date of marriage before petitioning for divorce.

[18] In the case of *W v. W* [1966] 2 All ER 889, the court held that:

> (i) on such application the court's approach was to examine critically the affidavit allegation, which the court is not bound to accept, and from them to reach a conclusion whether, if the allegation were true and if account were taken of improbabilities and inconsistencies, the matters alleged would amount to exceptional hardship or exceptional depravity.

[19] In the case of *Bowman v. Bowman* [1949] 2 All ER 127, a wife applied for leave of the court on the ground of exceptional hardship suffered by her as the husband had committed adultery even though three years had not lapsed since the date of marriage. In this case Lord Denning at p. 127 held:

> If there is nothing more than adultery with one person within the first three years of marriage that may be considered ordinary depravity. There is, I am sorry to say, nothing exceptional about that situation, and it does not involve exceptional hardship on the applicant. If, however, the adultery is coupled with other matrimonial offences, eg, if a husband not only commits adultery, but also deserts his wife in favour of another woman, or if he is cruel to her, thus causing her not only distress by his adultery but also injury by his violence, then, even if his offence cannot be stigmatised as exceptional depravity on his part, nevertheless, it does involve exceptional hardship suffered by the wife.

[20] In the case of *Hillier v. Hillier and Latham* [1958] 2 All ER 261, it was reported that a husband applied for leave to present a petition of divorce before the expiry of three years of marriage on the ground of exceptional hardship as his wife had left him and committed adultery and thereby causing the husband distress leading to a breakdown in health. The Court of Appeal held at p. 261 as follows:

> ... the approach to a determination of such an application should be subjective and, as the fresh evidence showed that the particular individual who was the husband in this case would suffer in health if he had to wait the full period of three years before being able to present a petition for divorce, a case of exceptional hardship was made out and leave to present the petition should be granted.

[21] In the case of *V v. V* [1966] 3 All ER 497, the Court of Appeal at p. 493 held:

> ... although the question was one for the discretion of the commissioner, whose decision could only be reversed if it was plainly wrong, all the elements were present in the case which would justify the exercise of discretion in favor of the wife, the charges against the husband of cruelty and of adultery being of an exception grave nature and the prospect of further reconciliation being nil; leave for the petition to be presented would, therefore, be granted.

[22] It must be noted that if the alleged hardship was founded on past behavior and there was no allegation of continuing or present exceptional hardship, leave will not be granted. This principle was laid down in the case of *Brewer v. Brewer* [1964] 1 All ER 539. Where Willmer LJ stated at p. 541 as follows:

> I emphasise that because it is not suggested that this is a case in which, the parties having now separated, any exceptional hardship is now being inflicted on the wife through having to wait before she can file a petition. In so far as one looks only at the behaviour of the husband in the past, it seems to me that one is in danger of confusing the quality of the act with the effect on the victim; in other words, there is a danger of confusing the depravity of the behaviour with the hardship to the victim.

[23] In this case the court concluded that:

> ... leave should not have been granted because, assuming that the allegations in the wife's petition were true, the degree of hardship inflicted on her was not exceptional; moreover the alleged hardship was founded on past behaviour and there was no allegation of continuing or present exceptional hardship, as by postponement of the institution of divorce proceedings.

[24] In the case of *Re PMK* [1981] NI 211, the applicant was married on 15 September 1979. The couple resided together at Whiterock, County Down until they parted on 7 April 1980. They had not lived together since that date. The application was under the provisions of art. 5 of the Matrimonial Causes (Northern Ireland) Order 1978. Article 5 provides:

> 5(1) Subject to paragraph (2) no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage.

[25] MacDermott J stated in his judgment:

> It seems clear to me after reading the applicant's affidavit and the medical reports that the applicant has been upset by the breakdown of his marriage. To that extent he has suffered hardship but is it exceptional hardship? As has been said time and again – indeed it is an obvious fact of life – it is distressful and upsetting for a spouse to find that a marriage which has been entered upon with joyous expectation has fallen apart in the first few months. Many people overcome such an experience with fortitude but much depends on the psychological make-up of the person who suffers and the facts giving rise to such suffering.

[26] In this case the court granted the applicant leave to issue his petition as the applicant has made out a case of exceptional hardship.

[27] In our present case, this court agrees with plaintiff's counsel that the conduct of the defendant had caused deep humiliation and untold embarrassment and misery to the plaintiff and should be considered as exceptional circumstances. This is so as the blog postings by the defendant in the internet operates in a borderless realm and it continues to exist until the maker of the blog removes it. The slanderous statements in the blogs which equated the plaintiff to a prostitute and a swindler had caused damage to the

plaintiff's honour and reputation as a woman and a human being. These statements made by the husband in the internet will continue to haunt and harass the plaintiff even after it is taken out from the internet. The damage is done since it been circulated to her friends and family and to all internet users who had sight of it. The plaintiff is traumatised. The hardship caused is not only past hardship but is present and continuing. This court should in the circumstances take one step further in interpreting the said sections in accordance with the modern development of information and technology. The interpretation on the term "exceptional circumstances" therefore should not be restricted or limited to just physical and mental abuse or cruelty but it must also include any circumstances or hardship that is caused by any slanderous statements made in any blog or internet.

[28] In this present case, after analyzing the reported cases as discussed above, it must be noted that this court should decide by making its own subjective value judgment as to whether the hardship suffered by the plaintiff was out of the ordinary. Thus in answering to both the issues, this court is of the opinion that the hardship suffered by the plaintiff due to the blog postings of the husband is out of the ordinary and falls within the definition of exceptional circumstances as envisaged by both ss. 50(2) and 106(1)(vi) of the LRA 1976. This court also makes a finding that since the parties had been separated since July 2007 and the husband is resident in France, it is impracticable for them, especially the husband to be referred to a conciliatory body. Moreover the chances of reconciliation between the parties are to my mind, in the circumstances improbable if not nil.

Conclusion

[29] After considering all relevant cases and facts as highlighted above, this court is satisfied that the combination of two serious matrimonial offences ie, threatening and slandering a spouse in blog postings in the internet were enough to justify leave. Furthermore this case also fulfils any reasonable description of the phrase exceptional circumstances. The affidavit affirmed by the plaintiff clearly showed that the plaintiff has suffered and is still suffering and will continue to suffer exceptional hardship as a result of the defendant's conduct. This court also concluded that there was evidence that the plaintiff suffered mental stress and nervous

breakdown due to the said hardship. Furthermore the future hardship should be taken into account as many of the defendant's posting has expressed and implied that the plaintiff is still his wife and as such he is entitled to continue such behavior until the marriage ends. Thus, the answer to the two issues as stated above should be in the positive.

Order

[30] In this case it is clear that the plaintiff had satisfied the exceptions under ss. 50(2) and 106(1)(vi) of the LRA 1976. In that light, this court allowed the application by the plaintiff for her prayers under para (1) for the presentation of the petition for divorce to the court before the expiration of the period of two (2) years from the date of the marriage; para (2) for exemption to refer her matrimonial difficulty to a Conciliatory Body; para (3) to file a divorce petition within 30 days from the date of this order; and para (4) plaintiff to pay cost of this application.

[31] Order accordingly.